

BEFORE THE PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI

In the Matter of a Review of the Missouri Public)
Service Commission's Standard of Conduct Rules)
and Conflicts of Interest Policies)

Case No. AO-2008-0192

NOTICE REGARDING EXTERNAL COMMUNICATIONS **PROCEDURAL QUESTIONS RECEIVED FROM INTERESTED** **PARTICIPANT, TOM BYRNE**

Issue Date: December 31, 2007

On December 28, 2007, at approximately 11.10 a.m., the Regulatory Law Judge, moderating for this workshop docket received a phone message inquiry from Mr. Tom Byrne regarding procedures to be followed for participation in this docket. Mr. Byrne reported that the Kansas City Business Journal had referred the scheduled Roundtable Discussion in this matter as being a "hearing" and that "testimony" would be taken. Mr. Byrne wanted to confirm the character of the proceeding that has been scheduled so that he might adequately prepare.

To be clear, the proceeding that is scheduled is a Roundtable Discussion. To quote directly from the Notice of Clarification that was issued on December 19, 2007:

Additionally, the Chairman wishes to stress that this is not an adversarial proceeding. This is not a "contested case," meaning a proceeding before the agency in which legal rights, duties or privileges of specific parties are required by law to be determined after hearing.¹ This is a workshop docket opened to receive input regarding the Commission's Standard of Conduct Rules, policies and practices and the Conflicts of Interest Statute.

Determination of contested cases involves the Commission's exercise of its judicial power. Workshop cases, such as these, do not constitute

¹ Section 536.010(4), RSMo 2000.

contested cases, even if they result in a determination that the Commission will engage in rulemaking. Rulemaking is an exercise of the Commission's legislative power.² In contrast to an adjudicatory, trial-type hearing in the nature of that in a contested case, workshop proceedings contemplate that the Commission, or this instance the Chairman, will meet interested members of the public face to face providing an opportunity for comments and presentations.³

To clarify:

- (1) No interested person, group or entity is required to formally request intervention in this workshop docket in order to participate in the docket or in the Roundtable Discussion.
- (2) Any interested person, group or entity is free to attend the Roundtable, even if those persons, groups or entities do not wish to participate, but only wish to observe.
- (3) Any interested person, group or entity is free to file any materials concerning this workshop docket at any time before, during or after the Roundtable Discussion.
- (4) Materials filed prior to the Roundtable Discussion need not follow any particular format, and may be submitted in brief outline or summary form.
- (5) Any interested person, group or entity is free to participate in the Roundtable Discussion without having pre-filed any comments, statements, suggestions or responses.
- (6) The workshop docket, AO-2008-0192, will be kept open until, at least, January 31, 2008 to receive comments, statements, responses and suggestions. This will allow adequate time for any additional responses to be filed after the Roundtable and these filings may address initial comments and responses that were filed prior to the Roundtable Discussion, as well as any that were presented at the Roundtable Discussion.
- (7) Being a workshop docket, and not being an adversarial proceeding, those interested persons, groups or entities that decide to participate in the Roundtable Discussion will not be required to give sworn statements or testimony and will not be subject to cross-examination by any other interested person, group or entity. However, the Chairman may have questions for the participants in order to clarify their positions and may have responses to present with regard to any position or suggestion offered at the Roundtable.
- (8) Chairman Davis shall file all communications related to this docket as part of the record in this matter.

² "The identifying badge of a modern administrative agency is the combination of judicial power (adjudication) with legislative power (rulemaking)." *McNeil-Terry v. Roling*, 142 S.W.3d 828, 835 (Mo. App. 2004).

³ *State ex rel. Atmos Energy Corp. v. Public Service Com'n of State*, 103 S.W.3d 753, 759-760 (Mo. banc 2003).

Judge Stearley responded to Mr. Bryne's inquiry by phone on December 31, 2007, and addressed his procedural questions with the same information that is outlined above. Mr. Bryne's inquiry and Judge Stearley's response are not *ex parte* contacts, because this is not a contested case, and there are no adversarial parties to this workshop.⁴ However, in the interest of maintaining transparency throughout this docket, notice of these phone conversations is being filed in this matter.

BY THE COMMISSION



Colleen M. Dale
Secretary

(S E A L)

Dated at Jefferson City, Missouri,
on this 31st day of December, 2007.
Stearley, Regulatory Law Judge

⁴ It should be noted that even if one were to stretch their imagination and refer to these contacts as being an *ex parte* contact, which they are not, not all *ex parte* contacts are prohibited or inappropriate. Indeed, "[t]he mere opportunity to receive information outside the courtroom which has the potential to affect considerations in a case is no basis to require a judge [or commissioner] to disqualify himself." *VonSande v. VonSande*, 858 S.W.2d 233, *237 (Mo. App. 1993); *J & H Gibbar Const. Co., Inc. v. Adams*, 750 S.W.2d 580, 583 (Mo. App. 1988); *Berry v. Berry*, 654 S.W.2d 155, 159 (Mo. App. 1983). "If the record discloses an opportunity to obtain information that would disqualify the judge, it may also disclose facts that negate any reasonable question concerning the trial judge's impartiality." *Id.* **Communications relating only to procedural matters, absent any discussion of the merits of a case, especially in light of no suggestion to the contrary, serve to dispel any further question of impropriety. *Id.***